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BRIEF OF RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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BRIEF OF RESPONDENT

INTRODUCTION

The petitioner, in his opening brief, has correctly cited the opinions of the Supreme Court of Colorado of which he here complains, and the dates of the respective judgments.

We accept his statement concerning the jurisdiction of this court.

We also accept his statement of the constitutional question involved, except that we deny his fundamental

premise that, in this case, the right of the petitioner to be free from unreasonable search and seizure, was violated.

Counsel for the petitioner, in specifying the errors upon which they will here rely, have gravely erred in assuming that the petitioner was subjected to an unreasonable search and seizure by the investigating officers of the State of Colorado. This we emphatically deny; and, if the court sustains our position on this point, we submit that there will be no issue before the court.

If, however, the court determines that an unreasonable search and seizure occurred, it will then become necessary to determine whether or not, under the circumstances here appearing, the witnesses whose names were procured from the day books so seized, were competent to testify against the accused, and if the reception of their testimony in a state court, in a trial for violation of a state statute, constituted a denial of the rights of the petitioner under the Constitution of the United States.

With the modification above noted, we accept the specification of errors set forth by counsel for the petitioner, and, after briefly supplementing their Statement of the Case, we will proceed to answer the several arguments they have advanced.

STATEMENT OF THE CASE

For the sake of convenience, and in view of the fact that two cases are here pending, we shall adopt the procedure outlined by counsel for the petitioner and, in referring to the record in case No. 17, such reference will be indicated as 17 R..... Reference to the record in case No. 18 will be indicated as 18 R..... All references will be to the page numbers of the printed transcript.

It is true, as counsel states, that the petitioner, at all times here involved, was a licensed physician, and that he maintained his office in the City and County of Denver and State of Colorado. His co-defendant in case No. 17 was one A. H. Montgomery, a chiropractic doctor (17 R-1), while his co-defendants in case No. 18 were Charles H. Fulton, a chiropractic doctor, and Betty Fulton, the latter's wife, (18 R-1). In both cases, the defendants were charged with conspiracy to perform an abortion, the respective cases, of

course, being predicated upon separate offenses, involving different patients and committed at different times.

The alleged unlawful search and seizure of which complaint is here made was incident to an investigation concerning yet another abortion assertedly performed by this petitioner, for which he was never prosecuted. The transcripts filed here give very little information concerning this matter, merely stating that the chief investigator for the office of the District Attorney of Denver "had occasion to make an investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel" (17 R-10). The true facts, which we are sure the petitioner will not deny, are that, on April 25, 1944 Miss Martin was found in the Cosmopolitan Hotel, in Denver, seriously ill. She was immediately transferred to the Denver General Hospital where it was determined that she was suffering from an abortion. The following day, Miss Martin made a statement naming this petitioner and Dr. A. H. Montgomery as the persons who had caused her abortion. (17 R-11).

> "In other words, Mr. Humphreys, you had the two defendants (Wolf and Montgomery) arrested because of the information you received from Gertrude Martin that these two defendants had caused her abortion, is that correct? A. Yes, sir." (Parentheses supplied.)

The statement referred to was obtained from Miss Martin on April 26, 1944. The following day, April 27, Dr. Wolf was placed under arrest by a deputy sheriff of Denver, accompanied by two deputies from the office of the District Attorney, for investigation concerning this offense. (17 R-14) At the time of the arrest, two day books, one for the year 1943 and one for the year 1944, the same being designated as People's Exhibits "A" and "C" in the Wolf-Montgomery case (No. 17), and People's Exhibits "D" and "E" in the Wolf-Fulton case (No. 18) were found lying on a desk and a book case in petitioner's office (18 R-28) and taken by the arresting officers incident to the arrest. This was the "unreasonable search and seizure" which the petitioner now contends violated his rights under

the Fourth Amendment to the Constitution of the United States.

The original record is replete with the statement, often repeated, that Dr. Wolf was arrested on the complaint of Miss Martin, and that it was at the time of such arrest, and as an incident thereto that the books in question were taken by the arresting officers.

At this point, it should, we feel, be noted that the cases subsequently filed alleged that Drs. Wolf and Montgomery, on or about April 7, 1944, had unlawfully conspired to procure an abortion of one Mildred Cairo (case No. 17), and that Drs. Wolf and Fulton, on or about April 27, 1944, had unlawfully conspired to procure an abortion of one Agnes Vera Bashor (Case No. 18). The names of both women were taken from the day books removed by the arresting officers from the office of the petitioner when he was first placed under restraint, but it is significant to note that such books merely disclosed the fact that such women, and others, had been to the office of Doctor Wolf on certain days. They did not disclose the reason for such visits, the nature of the complaint from which the patient was suffering, or the treatment administered by the physician. All such information was supplied by the direct testimony of the women themselves, neither of whom claimed any right to refuse to testify on the ground of self-incrimination, nor did either contend that the testimony they freely gave was confidential.

In each case, other women who had been aborted by Dr. Wolf and one or the other of his co-defendants, depending on the case being tried, were permitted to testify to the illegal acts of the petitioner. Such evidence, however, was strictly limited to the purpose of showing plan, design and intent, and the jury was so instructed.

It should also be noted, we believe, that in the Wolf-Fulton case (No. 18) at least three of the witnesses who testified to similar offenses, i.e., Rogers, Zurcher and Gorman, were contacted because slips bearing their names and addresses were taken from the person of the defendant, Fulton, at the time of his arrest. Their identity was not ascertained from an examination of the books of this

petitioner, although such books confirmed the fact that each of them had been received and treated by him.

The facts above stated are, we believe, a sufficient supplement to the Statement of the Case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

The respondent will first contend that there was no unreasonable search and seizure in either case here at bar. We shall argue that where, as here, a law enforcement officer has reasonable grounds to suspect the commission of a felony, he has a right, if indeed not a duty, to place the suspect under arrest. Such arrest, at the risk of the officer, may be made without warrant, and reasonable seizure of pertinent evidence may be made as an incident to the arrest.

We shall further assert that the records in the instant cases refute the contention that the officers were engaged in a mere "exploratory" search for evidence, and we sincerely contend that there was no search at all of the office of the petitioner. The books taken were lying in plain sight and open view, subject to be examined by any person who desired so to do.

We contend further that, in the event the court should determine that the books were illegally seized, nevertheless, the witnesses whose names were obtained therefrom were competent to testify. The testimony itself was admissible, relavent and material. The manner in which the identity of the witnesses was established, as distinguished from the incriminating testimony given by such witnesses is not open to inquiry, and the reception of such testimony did not violate any of the constitutional rights of the petitioner.

Finally, we shall assert that each state has the inherent and inalienable right to prescribe rules of evidence to be in force and effect in its own jurisdiction where prosecution is had in a state court for violation of a state statute.

ARGUMENT

I. The Arresting Officers Were Not Guilty of an Unreasonable Search and Seizure.

In presenting our answers to the arguments of counsel for the petitioner, we have attempted to arrange the issues for discussion in orderly sequence. As we see it, the first question here involved is whether or not the arresting officers were guilty of making an *unreasonable* search and seizure when they picked up the two day books in the office of Dr. Wolf at the time he was first placed under arrest. We do not contend that a lawful search or a lawful seizure can follow an illegal arrest.[1] Conversely, if the arrest was legal, i.e., if it was made by the officers at a time when they had reasonable grounds to believe that the suspect had committed, or was about to commit, a felony, it follows that they had a right to take into their possession, incident to the arrest, such visible and accessible items of evidence as were available to them. In this connection, it should be noted that we do not assert that the arresting officers had the right to conduct a general search of the office of the accused, or to rummage through the place. No such action was taken, and no threats of force were used. Therefore, this latter premise, so far as the cases at bar are concerned, is moot.

In the absence of a specific statute authorizing arrest without warrant, except in the case of constables,[1] the State of Colorado has adopted and consistently employed the common law rule that a peace officer may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence. In the case of felony, he may also arrest when he has reasonable grounds to believe that a felony has been, or is about to be committed by the person suspect.[2]

This, we believe is the general rule, well stated in the following words:

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1. Sect. 156, Ch. 96, 1935 C.S.A.

2. Newman v. People, 23 Colo. 300, 310, 47 Pac. 278, Corder v. People, 87 Colo. 251, 259, 287 Pac. 85, People v. Hutchinson (Colo.) 9 Fed. (2nd) 275.

"Generally speaking, either a peace officer or a private individual may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence. Nor is authority to arrest without a warrant confined to offenses committed in the presence of the person making the arrest: arrests without warrants may be made for felonies, whether or not they were committed in the presence of the officer or the private individual making the arrest. . . . An officer may arrest when he has reasonable grounds to suspect that a felony has been committed and may justify by proof of a ground which the law deems reasonable."

4 Am Jur 15, Sect. 22.

The rule has been recognized by this court, and, except perhaps, in some few states that may be governed by local statute is, we believe universally accepted.

"On reason and authority the true rule is that if a search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, . . . the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Carroll v. United States, 276 U. S. 132, 45 Sect. 280, 283.

The court has also said:

". . . we assume . . . that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the apprehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid."

Go-Bart Importing Co. vs. United States, 282 U. S. 344, 51 S. St. 153, 158.

This rule, then, is so firmly embedded in the jurisprudence of this nation that we feel it would be an imposi

tion upon the time of the court to present further argument in support of its validity.

We recognize that there is no set standard by which one can say whether or not an arresting officer had "reasonable grounds" to believe that a felony had been or was about to be committed by the accused. We submit that this fact must be determined in each particular case on its merits. We, therefore, pause briefly to point out the salient facts known to the officers at the time when they took Dr. Wolf into custody.

On April 25, 1944, Mr. Ray Humphreys, who, at that time was chief investigator for the District Attorney of Denver, received an anonymous telephone call that a woman at the Cosmopolitan Hotel was suffering from an abortion. The transcript filed by petitioner merely recites that Humphreys "had occasion to make an investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel" (17 R-10), but the original record shows that Miss Martin was found by the officers in rather serious condition, that she was removed to the Denver General Hospital for care and treatment, and later made a statement definitely naming this petitioner and his co-defendant, Dr. Montgomery, as the persons who had performed the illegal abortion upon her.

In Colorado, it is a felony to perform an illegal abortion.[3] Immediately after receiving this information, above referred to, Mr. Humphreys dispatched a deputy sheriff, who also served as an investigator (17 R-14), to the office of Dr. Wolf for the purpose of placing him under arrest. Such officer clearly said that he went to the office of Dr. Wolf to arrest him because of the information received that felonies were committed there (17 R-14).

He was accompanied by two deputies attached to the staff of the District Attorney, and, having arrived at the office, he proceeded forthwith to arrest Dr. Wolf "on the complaint of Miss Martin" (17 R-14).

While this portion of the record is not before the court in toto, the full transcript of the proceeding was reviewed

[3] Sect. 56, Ch. 48, 1935 C.S.A.

by the Supreme Court of Colorado, and since that court found nothing to indicate an illegal arrest, and specifically declared that the seizure of the two day books taken by the officers at the time of the arrest was not an *unreasonable* seizure in violation of Sect. 7, Art. II of the Constitution of Colorado which forbids unreasonable search and seizure, nor was it a violation of Sect. 18, Art. II of said constitution, which provides "that no person shall be compelled to testify against himself in a criminal case".[4] The cases at bar come before this court clothed in the armor of judicial approval supplied by the opinions of the court of last resort of the state whose laws were violated. This interpretation of the factual situation should, we submit, bear great weight here, and we are sure that this court will give proper recognition to the opinion of the Supreme Court of Colorado.

We arrive at the conclusion of the first issue, then, confidently asserting that in the cases here before the court, the petitioner was *lawfully* arrested by a deputy sheriff of the City and County of Denver, on the complaint of Miss Martin, and after such officer had reasonable grounds to believe that Dr. Wolf had committed a felony. Incident to such arrest the officer had the right to take into his possession such visible and accessible items of evidence as were available to him. There was, we submit, no *unlawful* arrest, and certainly no *unreasonable* search and seizure.

II. The Arresting Officers Were Not Engaged in a General or Exploratory Search.

We submit that it is one thing if arresting officers, having gained access to the residence or business establishment of an accused person, proceed to break open locks, rummage through drawers, open closed receptacles, or, by force and violence of any kind, conduct a general or exploratory search of the premises for evidence. Such a search without a warrant is, we are most certain, illegal. It is quite another matter, however, if arresting officers, making a legal arrest, seize evidence on the person of the accused, or readily accessible to them on the immediate

[4] Wolf v. People 117 Colo. 279, 187 Pac. 2nd 926, 927.

premises, all as incident to the arrest. The latter situation is what we find in the cases at bar.

Counsel for the petitioner frankly concede that of the two day books here in question, one was on a table in the doctor's office, and the other on a book case (17 R-12, 18 R-28, 29) both in plain view of the officers and readily accessible to them, or anyone else who might enter upon the premises. At no time was the doctor coerced. He was not compelled to produce his books by threats or violence, nor were the desks, files or other closed receptacles of any kind disturbed. The officers simply walked into his office for the purpose of placing Dr. Wolf under arrest, and, incident thereto, they picked up two ordinary day books lying openly and in plain view on the table and bookcase. Under these circumstances, the following authority is in point:

> "When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. . . . The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise: *Agnello v. United States*, supra, 30 (46 S. Ct. 4); *Carroll v. United States*, 267 U. S. 132, 158, 45 S. C. 280, 69 L. Ed. 543, 39 A. L. R. 790; *Weeks v. United States*, supra, 392 (34 S. Ct. 341). The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers v. United States* (C.C.A.) 2 F. (2d) 146; *Kirvin v. United States*, supra; *United States v. Kirschenblatt*,

supra. The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Marron v. United States, 275 U. S. 192, 72 L. E. 231, 48 Sect. 74.

While it is true that Dr. Wolf was not actually engaged in an unlawful act at the time of his arrest, his office, together with that of Dr. Montgomery and Dr. Fulton, was used to carry out the unlawful conspiracy, each doctor using his own office to carry out his part of the unlawful act, and splitting the fees obtained from their desperate patients between them. It is interesting to note that on the very day of the arrest, Agnes Bashor, principal witness in case No. 18, having previously been examined by Dr. Wolf at his office, called at the office of Dr. Fulton where he administered to her the noxious drugs and substances designed to cause her to miscarry, and then sent her to the hotel room he had reserved for her, with instructions to call Dr. Wolf as per arrangement when the drugs took effect, and she needed his services (18 R-16, 17). In this sense of the word, Dr. Wolf was actually engaged in the unlawful conspiracy complained of by the People at the time of his arrest. His office was his headquarters where he awaited call summoning him to participation in the next step of the conspiracy, i.e., the care of the patient after the miscarriage had, in fact, occurred. The books in question were then and there on the premises and in his immediate possession and control. Nor, we submit, can it be denied that such books were "convenient, if not in fact necessary" for the conduct of the doctor's odorous activities.

This court later approved the Marron case, supra, saying:

> "As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were

visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place."

Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. E. 374, 382, 51 S. Ct. 153.

But, say counsel, the seizure of the day books of the petitioner and the subsequent examination thereof by law enforcement officers, was "indecent." Hence, they conclude, unreasonable. They seem to attach some special or peculiar sanctity to the memorandum kept by Dr. Wolf of his criminal activities merely because the petitioner is a doctor. In this conclusion we certainly do not follow them. We have all due respect and the greatest admiration for those unselfish men and women engaged in the practice of the healing arts, who administer to the ills of suffering humanity. When, however, a licensed practitioner so far forgets the oath of his profession that he capitalizes on his knowledge of medicine, and openly and brazenly violates the law, all because of his insatiable greed for gold, we submit that his records are no more inviolate than those of any other law breaker. Again, we point out, the women who sought the services of Dr. Wolf and his co-conspirators were technically just as guilty of a criminal offense as were the defendants. For them, however, we can have compassion. Of the enormity of their moral sin we are not called upon to judge. Suffice it to say that these women, finding themselves with child, and, perhaps fearing the shame that society imposes upon unwed mothers, or perhaps attempting to avoid the economic burden an unwanted child would impose upon them, were desperate. They were acting under emotional strain, a condition we can understand if not condone. The doctors, however, had no such excuse to mitigate their unlawful conduct. Theirs was a coldly calculating, systematic exploitation of the unfortunate plight of these unhappy women. The record reeks with the brutal story, told time and time again, that no help would be forthcoming to aid the girls to free themselves from the rigors of their undesired pregnancy until the fees of the petitioner and his co-conspirator, and high fees they were, were paid in cash and in advance.

Counsel talk of decency and the moral law! Their words, we say, are gravel in their mouths. Greed, not com-

passion, was the motivating influence behind the acts of the accused. Fear, not sympathy, was the lot meted out to those who sought their services.

So far as we can determine, the "privilege" that attaches to communications between physician and patient is not here involved. The patient alone, as counsel concede, can claim the privilege. When such privilege is waived by the patient, we know no rule of law, and no dictate of reason, that permits the doctor to claim "privilege" to hide his illegal act.

By the same token, had the petitioner been guilty of the illegal dispensation of narcotics, he could argue that it was "indecent" for the prosecution to summon the addict patient to testify where he procured the drug. Neither the addict, nor, in this case, the women who had been aborted, were, we presume, anxious to reveal their illegal conduct. Nevertheless, their testimony was competent, their privilege, if any, personal.

We leave this portion of our argument secure in the belief that up to this point we have demonstrated that the petitioner was legally arrested by officers of the law, who had *reasonable* grounds to believe that he had, or was about to commit a felony. That, incident to such arrest, the day books of the petitioner were taken by the arresting officers, and that no *unreasonable* search or seizure of evidence was made by them. These facts appear from the record. Under these circumstances, and relying upon the cases of *Carroll v. United States*, supra, *Go-Bart Importing Co. v. United States*, supra, and *Marron v. United States*, supra, we confidently submit that this petitioner could not claim a violation of his rights under the Constitution of the United States even had he been prosecuted in a Federal court for a federal offense. In other words, we have a *lawful* arrest, even though made without warrant, and, incident thereto, the seizure of evidence in plain sight, and in the possession and control of defendant at the time of the arrest. Hence, there are no facts to sustain petitioner's contention of *unreasonable* search and *unreasonable* seizure. The evidence thus procured by the officers was, we submit, competent and admissible against petitioner in *any* court,

state or federal, and quite irrespective of the application of rules of evidence, hereinafter discussed.

If our position is sound, the instant cases need go no further because all of the contentions of counsel for the petitioner have been answered. Because we believe our position to be sound, we respectfully ask that the opinion of the Supreme Court of Colorado be forthwith affirmed.

III. The Evidence Adduced by the Prosecution Was Admissible.

As hereinabove stated, we do not concede that, at any time herein concerned, there was an improper seizure of the records of this petitioner. Nevertheless, since his whole argument is based upon the assumption that such condition existed, we accept his premise for the purpose of argument only.

Fundamentally, counsel concede that the Fourth Amendment, and other amendments to the Constitution of the United States which constitute the Bill of Rights, have no application to the state governments. They cite *National Safe Dep. Co. v. Illinois*, 232 U. S. 58 as authority for their position. We agree with counsel in their interpretation of the cited opinion.

Nonetheless, and ignoring the opinions of this court, they now contend that the Fourteenth Amendment should be interpreted to mean that evidence, no matter how competent in itself, if illegally seized, may not be used to sustain a conviction in a state court. To permit the reception of such evidence, they say, is to permit conviction without due process of law. This was the identical contention made in the case of *Adams v. New York*, 192 U. S. 585, 594. There it was asserted that the private papers of the accused were seized in a raid of his premises, and as the result of an unreasonable search and seizure. It was contended that such papers were used by the State of New York to convict him in contravention of the 4th, 5th and 14th Articles of Amendment to the Constitution of the United States. The court, however, held that the 4th and 5th Amendments to the Constitution of the United States do not contain limitations upon the power of the states, and continues:

"We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states."

Id. Pg. 594.

This case has been repeatedly followed, among other cases, as counsel say, in *Consolidated Rendering Works v. United States*, 207 U. S. 541, 551.

Where, we ask, is the essential difference between *Adams v. New York*, supra, and the cases at bar? Even if we concede counsel's assertion that here, as in the Adams case, there was an illegal seizure of evidence, the rule remains that since the 4th and 5th Amendments are not limitations on the powers of the states, there is no need to determine whether or not the 14th Amendment made the rights thereby secured privileges and immunities of citizens of the United States of which they may not be deprived by state action. Amplifying this comment, it seems crystal clear that the 14th Amendment conferred no *new* rights or privileges upon citizens of the United States. Therefore, if freedom from unreasonable search and seizure, and the right to be free from compulsion to furnish evidence against oneself, as guaranteed by the 4th and 5th Amendments to the Constitution of the United States, never constituted limitations upon the power of the states, it is unquestionably sure that the 14th Amendment could not extend a right or privilege that never existed.

The point we are trying to make is, unquestionably, more ably stated by this court as follows:

"That the primary reason for that amendment (14th) was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions. But, as said

in the *Slaughter-House Cases*, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, wherein it is said that sovereignty for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase 'privileges and immunities' of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in any manner abridge, then, the sovereignty of the state in regard to them has been entirely destroyed, and the *Slaughter-House Cases* and *United States v. Cruikshank* are all wrong, and should be overruled.

"It was said in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, it was stated by the present Chief Justice that—

" 'The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.' "

Maxwell v. Dow, 176 U. S. 582, 593.

Contrary to this decision, counsel for the petitioner now argue that the term "due process of law" as used in Sect. 1 of the 14th Amendment, refers back to the prohibition against unreasonable search and seizure, as stated in the 4th Amendment, and makes of that prohibition a limitation on the state, even though the 4th Amendment itself constitutes no such limitation.

In other words, counsel attempts to multiply nothing by nothing and get something. In spite of the well stated and highly emotional plea of counsel, however, the answer must still be that nothing multiplied by nothing equals nothing.

Much the same argument advanced on behalf of the petitioner was urged in *Palko v. Connecticut*, 302 U. S. 319. The court, however, disposed of such argument, saying:

> "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule."
>
> *Id.* Pg. 323.

Commenting again on the proposition that the immunities guaranteed by the Bill of Rights contained in the Constitution of the United States do not extend beyond those which arise out of the relationship of citizens of the United States to the national government, Mr. Justice Stone had this to say:

> ". . . there is no occasion, for jurisdictional purposes or any other, to consider whether freedom of speech and of assembly are immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States, or to revive the contention rejected by this Court in the *Slaughter-House Cases*, supra, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow

out of the relationship of United States citizens to the national government."

Hague v. Com. for Ind. Organization, 307 U. S. 496, 519.

We cannot refrain from quoting the rather extensive footnote that appears in explanation of the excerpt above set forth. We quote:

"The privilege or immunity asserted in the Slaughter-House Cases was the freedom to pursue a common business or calling, alleged to have been infringed by a state monopoly statute. It should not be forgotten that the Court, in deciding the case, did not deny the contention of the dissenting justices that the asserted freedom was in fact infringed by the state law. It rested its decision rather on the ground that the immunity claimed was not one belonging to persons by virtue of their citizenship. 'It is quite clear', the Court declared (16 Wall. page 74, 21 L. Ed. 394), 'that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics * * * in the individual.' And it held that the protection of the privileges and immunities clause did not extend to those 'fundamental' rights attached to state citizenship which are peculiarly the creation and concern of state governments and which Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. page 546, No. 3230, mistakenly thought to be guaranteed by Article IV, 2 of the Constitution. The privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws. *Slaughter-House Cases*, 16 Wall. 36, 79; 21 L. Ed. 394; see *Twining v. New Jersey*, 211 U. S. 78, 97, 98, 29 Ct. 14, 18, 53 L. Ed. 97.

"That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court. In re *Kemmler*, 136 U. S. 436, 448, 10 S. Ct. 930, 934, 34 L. Ed. 519; *Mc*

Pherson v. Blacker, 146 U. S. 1, 38, 13 S. Ct. 3, 11, 36 L. Ed. 869; *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 S. Ct. 721, 723, 37 L. Ed. 599; *Duncan v. Missouri*, 152 U. S. 377, 382, 14 S. Ct. 570, 571, 38 L. Ed. 485. Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; *Presser v. Illinois*, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615; *O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450; *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. Ed. 597; *West v. Louisiana*, 194 U. S. 258, 24 S. Ct. 640, 48 L. Ed. 965; *Twining v. New Jersey*, supra; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288.

"The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the Slaughter-House Cases. If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, such as were described in *Corfield v. Coryell*, supra, it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases*, with the decision against enlargement.

"Of the fifty or more cases which have been brought to this Court since the adoption of the Fourteenth Amendment in which state statutes have been assailed as violating the privileges and immunities

clause, in only a single case was a statute held to infringe a privilege or immunity peculiar to citizenship of the United States. In that one, *Colgate v. Harvey*, 296 U. S. 404, 56 S. Ct. 252, 80 L. Ed. 299, 102 A.L.R. 54, it was thought necessary to support the decision by pointing to the specific reference in the *Slaughter-House Cases*, supra, 16 Wall. page 79, 21 L. Ed. 394, to the right to pass freely from state to state, sustained as a right of national citizenship in *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, before the adoption of the Amendment.

"The cases will be found collected in Footnote 2 of the dissenting opinion in *Colgate v. Harvey*, 296 U. S. 404, 445, 56 S. Ct. 252, 266, 80 L. Ed. 299, 102 A.L.R. 54. To these should be added *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Ferry v. Spokane, P. & S. R. Co.* 258 U. S. 314 42 S. Ct. 358, 66 L. Ed. 635, 20 A.L.R. 1326; *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, 62 A.L.R. 785; *Whitfield v. Ohio*, 297 U. S. 431, 56 S. Ct. 532, 80 L. Ed. 778; *Breedlove v. Suttles*, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288."

Id. Pg. 520.

While we believe that the authorities cited clearly establish our contention that the Fourteenth Amendment does not operate to extend the provisions of the 4th and 5th Amendments as a limitation on the several states, we now turn to the specific arguments of counsel for the petitioner and demonstrate this inapplicability.

A. The due-process clause of the Fourteenth Amendment.

In support of their assertion, as they interpret it, counsel first cite *Twining v. New Jersey*, 211 U. S. 78, 99, 100.

In that case, of course, the court held that the first ten amendments are not operative on the states, and affirmed the judgment of conviction entered by the state court. There the court reiterated the rule that:

"Due process requires that the court which assumes to determine the rights of parties shall have

jurisdiction (*Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, 572; *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236), and that there shall be notice and opportunity for hearing given the parties. (*Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct. Rep. 841; *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520, 20 Sup. Ct. Rep. 410; and see *Londoner v. Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 708). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

Id., Pg. 110.

Applying this test to the cases at bar, it is clear that the courts of Colorado did have jurisdiction, and that the defendants had full opportunity to be heard and to present their defense. The rule approved by the Supreme Court of Colorado as to the admissibility of evidence was surely a rule of procedure, and hence not violative of the prohibitions prescribed by the 14th Amendment pertaining to due process of law.

Herbert v. Louisiana, 272 U. S. 312, next cited, also affirmed a state court conviction. There the court held that there was no denial of due process of law when it appeared that the state court had jurisdiction of the person of the accused, that the defendant was, in fact, before the court and was accorded full opportunity to defend.

Id., Pg. 315.

Adamson v. California, 332 U. S. 46, likewise an affirmance of a state court conviction, adds nothing to the instant argument, and *Palko v. Connecticut*, 302 U. S. 319, we have heretofore discussed.

B. Freedom from unreasonable search and seizure.

Counsel next cite a number of cases where this court has held that a conviction based upon a confession obtained by duress or coercion is a conviction obtained without due process of law, and hence illegal. They then argue, by analogy, that evidence obtained as a result of an illegal search falls in the same category, although they are unable to cite any authority to sustain their position.

A very important distinction arises between the two classes of evidence. In the first case, a confession obtained by duress or coercion is not *competent* evidence. This because it does not, by its very nature, bear the stamp of verity. An accused man, tortured by whatever means, may readily say whatever his tormentors may desire him to say, irrespective of its ultimate truth, to obtain temporary relief from inquisition. Consistently, the Supreme Court of Colorado has refused to sustain a conviction based upon an involuntary confession of the accused. The last pronouncement of the Colorado Court so holding is found in *Bruner v. People,* 113 Colo. 194, 156 Pac. (2nd) 111.

In the second case, the evidence may or may not be competent, but, if so, the sole ruling of the Colorado court is that such evidence is admissible, and that the court will not make a collateral inquiry as to the manner in which the evidence was obtained.

Imboden v. People, 40 Colo. 142, 90 Pac. 608.
Massantonio v. People, 77 Colo. 392, 236 Pac. 1019.
Roberts v. People, 78 Colo. 555, 243 Pac. 544.
Bills v. People, 113 Colo. 326, 157 Pac. (2nd) 139.

This, as we see it, is a rule pertaining to the admission of evidence, and goes no further than that.

Even the case of *Harris v. United States,* 331 U. S. 145, 155, cited by counsel, is not helpful to the cause of the petitioner here. There the court held that the evidence in question was legally seized, and sustained the conviction of the accused for a federal offense.

Mr. Justice Frankfurter, in his dissenting opinion, recognized that the rule relative to the admission of evi

dence illegally seized applies only in courts of the United States, as against the rule prevailing in many states of which Colorado is one, that such evidence is admissible, if otherwise competent.

Id., Pg. 159.

We have repeatedly stated, in the case at bar, that, as we view it, there was no illegal arrest, no unreasonable search and seizure, no general exploratory search, and no rummaging through the personal effects of Dr. Wolf.

We submit the point without further argument.

C. Protection from unreasonable search and seizure.

Very frankly, we submit that the discussion advanced by counsel for the petitioner in this portion of their brief (Pgs. 13-29—Brief of Petitioner) is wholly inapplicable to either of the cases at bar. All of the authorities they cite refer to prosecutions had in federal courts for the commission of alleged offenses against the laws of the United States. As to such cases there is no argument that evidence, if it has been illegally seized, is not admissible. We concede the point. Basically, however, we are back to the proposition that the prohibition against unreasonable search and seizure set forth in the Constitution of the United States is a limitation on the powers of the national government and does not extend to the government of the several states. We do not intend to be lured from this basic point of law by the argument of counsel whereby they sustain the federal rule.

So far as Colorado is concerned, the state constitution provides, in part:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Art. II, Sect. 7, Constitution of Colorado.

and

"No person shall be deprived of life, liberty or property, without due process of law."

Art. 2, Sect. 25, Constitution of Colorado.

The Supreme Court of Colorado, being the highest judicial tribunal of the state, determined that the guarantees of the state constitution were not violated by the proceedings had against Dr. Wolf and his co-defendants. This, of course, is evidenced by the order of said court affirming such convictions.

Wolf v. People, 117 Colo. 279, 187 Pac. (2nd) 926.
Wolf v. People, 117 Colo. 321, 187 Pac. (2nd) 928.

We respectfully submit that it is, and was, the responsibility of the state to determine this question, and that further discussion of the issue is precluded at this time. We ask the court so to declare.

D. The Petitioner was not denied due process of law.

Relying primarily upon the case of *Twining v. New Jersey*, 211 U. S. 78, counsel for the petitioner attempt to paraphrase the words adopted by this court in the discussion of the issue there involved, and, in effect, argue that an unreasonable search and seizure is, in itself, a denial of due process of law, irrespective and quite independent of the provisions of the Fourth Amendment to the Constitution of the United States.

Their first point is that any search or seizure, without warrant, is unreasonable. This premise, of course, is unsound because where, as here, the arresting officers have reasonable grounds to believe that the accused has committed or is about to commit a felony, arrest without warrant is fully justified (*Carroll v. United States*, supra), and the seizure of evidence readily accessible, obtained by the officers incident to the arrest, and not secured by a general exploratory search or a rummaging of the premises, is not an unreasonable search and seizure. *Marron v. United States*, supra, *Go-Bart Importing Co. v. United States*, supra.

They next contend that the rule against search and

seizure is substantive rather than procedural, and rely on *Boyd v. United States*, 116 U. S. 616 and the authorities therein cited. There is no question, if the petitioner were here prosecuted in a federal court for violation of a law of the United States, that the authority would be of value. Not so, however, in a prosecution in a state court for violation of a state statute.

If we turn to the case of *Twining v. New Jersey*, supra, which is the basis of the entire argument of counsel, we find that this court has always been extremely reluctant to define exactly "due process of law." Indeed, the court states that "few phrases of the law are so elusive of exact apprehension as this."

Id., Pg. 20. (29 S. Ct. 14, 20.)

What did the founding fathers of this great nation deem to be the immutable rights of all free men? The Declaration of Independence says the inalienable rights of mankind are, among others, life, liberty and the pursuit of happiness. It then states that these rights are secured by governments instituted among men and deriving their just powers from the consent of the governed. The signers of the Declaration of Independence did not complain of the acts of Great Britain in committing search and seizure without warrant, although history teaches us that such practice was prevalent in the colonies. It was not, however, one of the unbearable invasions of the rights of free men of which complaint was made. When the Constitution of the United States was adopted, the privilege of freedom from unreasonable search and seizure was, significantly enough, omitted. The framers of the Constitution did, however, include in that great document explicit prohibitions against the suspension of the writ of habeas corpus and the passage of ex post facto laws or bills of attainder. Specifically the states were denied certain powers, but the power to declare what evidence should be deemed admissible in the trial of a criminal case was, most surely, never removed from the control of the state.

We respectfully submit that if the court subjects the privileges set forth in the Fourth Amendment to the same test to which it put the privileges referred to in the Fifth Amendment (*Twining v. New Jersey*, supra), it is inevitable

that here, as there, the court will determine that freedom from unreasonable search and seizure is not an inalienable possession of every citizen, but a privilege protected, so far as national citizenship is concerned, by the Constitution of the United States, and, as to state citizenship, by the Constitution of the State. The Supreme Court of Colorado declared the rights of this petitioner under the Constitution of Colorado were not impaired. Further, the record discloses that the petitioner was lawfully arrested, that no exploratory search of his office was made, and that no question of unreasonable search and seizure is here involved.

It will be further noted, that all of the cases cited by counsel for the petitioner in this portion of their brief (Pgs. 20-27) pertain to proceedings had in federal courts for alleged federal offenses. The decisions do not attempt to review proceedings instituted in a state court for a violation of a state statute.

IV. The State of Colorado Was Within Its Powers in Permitting the Reception of the Evidence of Which Complaint Is Here Made.

Again we reiterate our position that Dr. Wolf was lawfully arrested, and that the day books taken from his office were properly taken as incident to the arrest.

If, however, for the sake of argument, we now concede that such books were illegally seized, still the petitioner cannot be heard to complain.

It is true that there is apparently an irreconcilable conflict among the decisions of the courts of last resort of the several states pertaining to the admission of evidence illegally obtained. Colorado, by the decisions of its Supreme Court, is committed to the doctrine that the manner in which evidence is obtained, whether legal or illegal, does not affect its admissibility. This rule was established in the case of *Lyboldt v. People*, 40 Colo. 142, 90 Pac 608. It was affirmed in the later cases of *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019, *Ballotti v. People*, 78 Colo. 555, 243 Pac. 544, and *Bills v. People*, 113 Colo. 326, 157 Pac (2nd) 130. In the case of *Ballotti v. People*, supra, the Colorado court said:

"4. Since the supersedeas was granted in the instant case we have established, as the rule in this jurisdiction, that the admissibility of evidence is not affected by the fact that it has been unlawfully seized. *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019."

"That conclusion was reached after a thorough examination of all the available authorities and a careful consideration of the alleged reasons supporting each. We reaffirm it. It is now urged, however, that one of the reasons there given must fail in this jurisdiction because section 3726, C. L. 1921, exempts an officer from liability for any unlawful act committed while engaged, in good faith, in the enforcement of the prohibition law. The validity of that act, when urged in defense of one who invades the sanctity of another's domicile in violation of the Constitution, must be determined when properly before us. It is not so here. If, under such circumstances, the act would be a complete defense, it must be because the legislature was empowered to adopt it, and if so its existence would affect in no way the rule laid down in the Massantonio case nor the reasons supporting it. There is ample authority, as therein set forth, for that decision, but it does not rest primarily upon authority, but upon reason. If the application of the rule were divorced from popular prejudice concerning the manufacture and sale of intoxicating liquor, and violations of law by corporations, proof of which depends upon records unlawfully seized, we think the unanimous verdict of lawyer and layman would support the rule of admissibility. Let it be announced, for instance, that one unquestionably guilty of an atrocious murder had been turned loose because it developed that the weapon with which the crime was committed and the blood soaked clothes of the victim, offered in evidence, and without which conviction could not be obtained, had been excluded because some rule of law had not been complied with in their seizure, and a shudder would run through the commonwealth, and its citizens, with one voice, would condemn the helplessness of its courts against the depredations of outlaws.

"The argument that the rule announced in the

Massantonio case leaves the citizens unprotected against one who unlawfully and violently enters his dwelling if the wrongdoer is unable to respond in damages, should be addressed to the legislature not the courts, and apparently overlooks the fact that such an entry was a criminal trespass and indictable at common law (19 Cyc. 1113, 1117), and that the common law has been adopted in Colorado."

Colorado is not alone in thus interpreting the law. Following earlier decisions of the state appellate court, the Court of General Sessions of New York County in 1939 approved the rule that

> "The court will not take notice of how they (papers or other articles of personal property) were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question."
>
> *People v. Kuhn*, 15 N.Y.S. (2d) 1005, 1007.

In Maryland, although now governed by specific statutory provisions, the like of which we do not have in Colorado, the Court of Appeals announced the law, in a well worded decision, as follows:

> "Prior to the enactment of the Bouse Act in 1929, Maryland followed the ancient rule of the common law that evidence is not rendered inadmissible by the fact that it was procured by unlawful search and seizure. *Meisinger v. State*, 155 Md. 195, 141 A. 536, 142 A. 190. The Supreme Court of California explained the reason for the rule in the following language: 'From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.' *People v. Mayen*, 188 Cal. 237, 205 P. 435, 440, 24 A.L.R. 1382. Unquestionably it is within the established power of the State to prescribe the evidence

which may be received in the courts of its own government."

Hubin v. State, (Md.) 23 Atl. (2d) 706, 708.

In 1938, the Supreme Court of North Carolina said:

"Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The Courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the Courts of North Carolina. *State v. Graham*; 74 N. C. 646, 21 Am. Rep. 493; *State v. Mallett*, 125 N. C. 718, 725, 34 S.E. 651 (affirmed by the United States Supreme Court on writ of error in *Mallett v. North Carolina*, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015; *State v. Thompson*, 161 N.C. 238, 76 S.E. 249; *State v. Wallace*, 162 N.C. 622, 623, 78 S.E. 1, Ann. Cas. 1915B, 423; *State v. Neville*, 175 N.C. 731, 95 S.E. 55; *State v. Godette*, 188 N.C. 497, 125 S.E. 24; *State v. Hickey*, 198 N.C. 45, 150 S.E. 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'"

State v. McGee, 214 N.C. 184, 198 S.E. 616, 617.

This decision was further approved by the same court in 1940 in the case of *State v. Shermer*, 216 N. C. 719, 6 S.E. (2d) 529, 530.

A well worded decision further recognizing the right of each state to fix the rules of evidence within its jurisdiction is as follows:

"... appellant insists that there must be removed from the evidence above discussed all testimony given by the two officers, for the reason that they entered the apartment without a search warrant. Continuing

his theory at this juncture, appelant complains that such actions on the part of those officers amounted to and were an infringement of his constitutional rights. More particularly, it is his claim that the trial court's reception of the evidence thus obtained violates the Fourth and Fourteenth Amendments to the United States Constitution, and sections 8 and 9, art. 1, of the Iowa Constitution. Further appellant urges that the federal prohibitory law does not permit the use of evidence obtained by a search and seizure without a valid search warrant, and cites *Peru v. United States*, (C.C.A.) 4 F. (2d) 880.

"But the indictment in the case at bar is not based upon the laws of the United States. Said instrument was founded upon the state law against trafficking in intoxicating liquors. So the state rule, as distinguished from the federal doctrine, must govern. Previously this court was required, at different times, to pass upon the question relating to the admissibility of evidence obtained in the manner and way here employed. Upon those occasions it was held that such evidence could be properly received. *State v. Bambertti*, 204 Iowa 670, 215 N.W. 752; *State v. Gorman*, 196 Iowa 237, 194 N.W. 225; *Joyner v. Utterback*, 196 Iowa 1040, 195 N.W. 594; *State v. Rowley*, 197 Iowa 977, 195 N.W. 881; *Lucia v. Utterback*, 197 Iowa 1181, 198 N.W. 628; *State v. Parenti*, 200 Iowa 333, 202 N.W. 77; *State v. Wenks*, 200 Iowa 669, 202 N. W. 753. Apt language in the Lambertti case is:

"'Prior to the time of the trial, the defendant filed a motion to suppress all of the evidence obtained by the search of the defendant's premises under the search warrant, on the ground that said search warrant was illegally issued, in that the same was in violation of section 8, article 1, of the Constitution of the state of Iowa, * * * and in violation of the Fourth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Constitution of the United States. This motion was by the court overruled.

"'Objections were made to all of the foregoing evidence at the time of the trial, for the reasons urged

in the "motion to suppress", and the objections were by the court overruled. These rulings by the court are assigned as error. In *State v. Tonn*, 195 Iowa 94 (191 N.W. 530), we held that evidence which is pertinent and relevant is admissible against the defendant in a prosecution for crime, even though the same was secured by an unlawful search of defendant's premises, and have universally so held in the subsequent cases. * * *"

"Reluctantly, there was no error permitting the introduction of such testimony."

State v. Bamsey, (Iowa) 223 N.W. 873, 874.

In a very recent decision by the Federal Circuit Court of Appeals (Tenth Circuit), the court said:

"When the officers got to his room, they took possession of two suitcases belonging to him. They opened them and examined their contents. These contents were offered and received in evidence over the objections of appellant. This evidence was of such a nature that it no doubt was considered by the jury and tended to influence its verdict. Admittedly the officers had no search warrant at the time they seized these suitcases and took possession of these exhibits.

* * * * *

"Even if we assume that the search was illegal, the evidence was nevertheless admissible. It is well settled that evidence obtained by State officers through an unreasonable or illegal search may nevertheless be used by the Federal government in a criminal case instituted in the Federal courts. Under this well settled principle, this evidence was clearly admissible."

Ruhl v. United States, (1945) 148 Fed. (2d) 173, 174.

We also call attention to the following pronouncement, made in 1944, quoting from an earlier California case:

"'There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from

whence it comes or the means by which it was obtained.'"

People v. Onofrio, (Cal.) 151 Pac. (2d) 158, 160.

Continuing, the California court said:

"This reason in the Mayen case found approval in the recent case of *People v. Gonzales*, 1942, 20 Cal. (2d) 165, 124 P. (2d) 44, 47, where it is cited with other cases and where the court also passed adversely upon the same contention that is made in the instant case, namely, that 'the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law.' The court points out that 'A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial,' and 'The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Cases cited.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.' A writ of certiorari was denied by the Supreme Court of the United States in the *Gonzales case*, 317 U.S. 657, 63 S. Ct. 55, 87 L. Ed. 528." (Id. 160.)

The ruling was affirmed in *People v. Peak*, (Cal.) 153 Pac. (2d) 464, where at page 469 the court, recognizing "that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence", concludes that, in that state, it is necessary to "turn to California decisions which must be accepted as the guide post directing the rule to follow."

So, in Colorado, the trial courts would indeed be subject to just criticism if they failed to look to the previous announcements of the Colorado Supreme Court "as guide posts directing the rule to follow" in this jurisdiction. That rule is unmistakingly set forth in *Tinhoden v. People, supra, Massantonio v. People, supra, Roberts v. People, supra,* and *Bilis v. People, supra.* So surely is this true that we deem it unnecessary to comment further on the point.

The situation, then, is plain that there does exist a "federal rule" of evidence, applicable in federal courts, which rule has been followed by some state courts. Other states, including Colorado, have followed the common law rule, as certainly we are bound to do until such time as the legislature of the state enacts an appropriate statute or statutes abrogating or modifying the common law.

Summing up our argument on this point, it is our sincere contention that there was no illegal search and seizure in the instant case, because the arrest, even though made without warrant, was nevertheless based upon a reasonable belief by the officers that the accused was guilty of a felony and was, therefore, lawful. No *search* of any kind was made, but evidence, in plain sight of the arresting officers, was taken and subsequently utilized. This was not an *unreasonable search and seizure* such as is prohibited by the organic law of Colorado. Furthermore, if there was an illegal search and seizure of evidence, competent in itself, such evidence was admissible under the decisions of the Supreme Court of Colorado, and the trial judge was bound to follow the rules of law so announced for this jurisdiction.

CONCLUSION

Summarizing our argument in the cases at bar, we respectfully submit that the following facts appear from the record, or are supported by the opinion of the Supreme Court of Colorado affirming the conviction of the petitioner and his co-defendants:

1. The petitioner was lawfully arrested by law enforcement officers who had reasonable grounds

to believe that he had committed, or was about to commit, a felony.

2. Incident to such arrest, the officers lawfully took into their possession, two day books lying in open view on a table and book case in the doctor's office.
3. There was no search of the premises, no breaking of locks, no opening of drawers, no search of files and no rummaging of the place by the arresting officers.
4. There was no unreasonable search and seizure contrary to the provisions of the Constitution, of Colorado, or the Constitution of the United States.

If the court sustains us in these points, the case is at an end, and the judgment of the Colorado court should be forthwith affirmed.

If, however, this court finds that there was an illegal seizure of the evidence by state officers, yet the admissibility of such evidence on a prosecution for violation of a statute of Colorado was a matter for determination by the state court. The only rights of the petitioner here involved were his rights as a citizen of the state, and his rights of national citizenship were not curtailed.

Finally; we urge that the freedom from unreasonable search and seizure guaranteed by the 4th Amendment to the Constitution of the United States, together with the other rights and privileges contained in the Bill of Rights, applies only to the national government and not to the state government, and that freedom from unreasonable search and seizure is no more a part of the immutable principles of justice than is freedom from compulsory self-incrimination, or the right to trial by jury. Hence, we submit, determination of the issue by the state court, which surely had jurisdiction of the person of the accused, and where he was given full opportunity to present his defense, accorded the petitioner due process of law.

We earnestly submit that the judgment of the Colorado court has violated none of the constitutional privileges or immunities of the petitioner, and we ask that this great

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SUPREME COURT, U.S.

OPPOSITION BRIEF.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 594 18

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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OPPOSITION BRIEF.

STATEMENT RE JURISDICTION.

While it is contended by petitioner that jurisdiction exists by virtue of Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925 (Chapter 229, 43 Stat. 936), the respondent respectfully suggests that such jurisdiction does not here exist because the final judgment of the Supreme Court of Colorado did not include in its opinion an interpretation of any federal statute nor did it attempt to interpret any title, right, privilege, or im-

munity claimed by the petitioner under the Constitution of the United States, nor, indeed, was any title, right, privilege, or immunity claimed by the petitioner under the Constitution of the United States presented for the proper consideration of the Colorado courts.

It will be observed from the brief filed by petitioner that he was convicted in two separate cases, as follows:

Julius A. Wolf and A. H. Montgomery v. The People of the State of Colorado. No. 15666.

Julius A. Wolf, Charles H. Fulton and Betty Fulton v. The People of the State of Colorado. No. 15670.

In this court, the petitioner has filed two separate abstracts, purporting to cover the record in each case above referred to, but only one brief. Here, the abstracts of record, designated as "Transcript of Record", are numbered as follows:

No. 593—Julius A. Wolf, Petitioner, v. The People of the State of Colorado, Respondent.
(This being the Wolf-Montgomery case, *supra* No. 15666.)

No. 594—Julius A. Wolf, Petitioner v. The People of the State of Colorado, Respondent.
(This being the Wolf-Fulton case, *supra*, No. 15670.)

In the Petition for Certiorari (p. 2), counsel assert that page references in their brief "are to the Wolf-Montgomery record" while "folio references are to the record in the Wolf-Fulton case." We have found it difficult to refer to the page numbers and folio numbers thus mentioned in petitioner's brief, and will, in our reference to the filed Transcripts of Record, identify the transcript to which we refer, and the page thereof to which we desire to call attention.

It is conceded by the petitioner that "the Fourth Amendment, like all other amendments which constitute the federal Bill of Rights, has no application to the state governments." (p. 7, Petitioner's Brief). Counsel contend, how-

ever, that the Fourteenth Amendment drew within its scope such earlier amendments as were "implicit in the concept of ordered liberty", and, from this premise, argue that the rights of the Petitioner under the Fourteenth Amendment were violated by the Colorado court.

It is fundamental, of course, that only such matters as are properly presented for review will be considered in an appellate court. Here, the petitioner did not claim, either in his motion for new trial, filed with the trial court nor in his Assignments of Error filed with the Supreme Court of the State of Colorado, any violation of his rights under the Fourteenth Amendment, nor, in the trial did he specially set up or claim any right, privilege, or immunity under the Fourteenth Amendment. No such question was presented for the consideration of the Supreme Court of Colorado, and the Court did not err in refusing to pass thereon.

only to the "4th Amendment to the Constitution of the United States" (pp. 67, 68), and his Assignments of Error likewise refer only to the same (Fourth) Amendment; (pp. 73, 74).

Likewise, in the Wolf-Fulton case (No. 594), the transcript discloses that petitioner's Motion for New Trial referred only to "the 4th Amendment of the Constitution of the United States", (p. 47, 48), and his Assignments of Error mentioned only the same (Fourth) Amendment (p. 56).

The Colorado courts, both the District Court of the City and County of Denver (the trial court), and the Supreme Court of Colorado, correctly interpreted the issues, i. e., the alleged violation of the rights, privileges or immunities of the petitioner under the Fourth Amendment, as unavailing to him in a prosecution in a state court for violation of a state statute.

It was not until all briefs had been filed in the appellate court, and both cases had been set for oral argument, that petitioner, for the first time, attempted to file a Supplemental Assignment of Error, in violation of the es-

tablished practice and procedure in Colorado, whereby, for the first time he attempted to assert a "violation of the rights of the defendant (petitioner) under the due process clause of the Fourteenth Amendment of the Constitution of the United States" (Wolf-Montgomery Transcript, No. 593, p. 83), (Wolf-Fulton Transcript, No. 594, p. 66). The Colorado Supreme Court properly denied petitioner's motion to file such supplemental assignment of error (No. 593, p. 83) (No. 594, p. 67), the same coming much too late to be considered by the appellate court.

The record thus conclusively shows that the petitioner, in the proceedings had against him in Colorado, at no proper time specially set up or claimed any title, right, privilege or immunity under the Constitution of the United States, applicable to the state government, as required by Section 237(a), Chapter 229 (43 Stat. 936), and hence has failed to establish the necessary grounds giving this court jurisdiction of the instant cause.

STATEMENT OF THE CASE.

The transcripts filed in this court on behalf of the petitioner omit many vital references to testimony given at the trial, and we therefore shall take the liberty of repeating a partial review of the evidence as the same appears in our original answer brief filed with the Supreme Court of the State of Colorado in the case of Wolf-Montgomery v. The People of the State of Colorado. We select this case because the Transcript filed in Case No. 593 in this court corresponds thereto and carried the identical folio numbers of the original record. The court will observe the omission in petitioner's instant transcript of numerous folios referred to in our statement of facts.

We shall confine our statement solely to the facts pertaining to the alleged unlawful search of petitioner's office and the alleged unlawful seizure of evidence.

It appears that on or about April 25, 1944, the office of the district attorney received an anonymous telephone call to the effect that "there was a woman suffering from an abortion in room 602 in the Cosmopolitan Hotel" (fol.

211). Responding to this call, one Ray Humphries, chief investigator, and his assistant, Louis Malach, proceeded to the hotel, where, in room 602, they found a young woman by the name of Gertrude Martin. Miss Martin was ill, and, upon being questioned, she told the officers that "she had been aborted by Dr. Montgomery and had been to see Dr. Wolf before and after the abortion, etc." (fol. 122). She was immediately removed to the office of the district attorney and thence to the Denver General Hospital for hospitalization (fol. 123). The information given Mr. Humphries by Miss Martin was, we gather, almost the same story related by Mrs. Cairo concerning her experiences in freeing herself, with the aid of these defendants, of the burden of an unwanted child.

Armed with this information, Mr. Malach, who, in addition to being an investigator for the district attorney, was also a deputy sheriff (fol. 174), and Mr. Thayer and Mr. Rice, both deputy district attorneys, proceeded, on April 27, 1944, to the office of Dr. Wolf for the purpose of placing him under arrest (fol. 126). As an incident to the arrest, the officers attempted to take any record "that might show the name of * * * Gertrude Martin" (fol. 138). It certainly does not appear that a "search" of the doctor's office was made, in any sense of the word. Mr. Thayer says that he saw Ex. "A" on a table in Dr. Wolf's office (fol. 145), and that he simply picked it up and brought it with him when he returned to the offices of the prosecuting attorney (fol. 146). Although we find no direct evidence pertaining to the acquisition by the people of People's Ex. "C" (the doctor's day book for 1943), Mr. Humphries indicates that "one other book", which, we presume was the day book for 1943, was taken at the same time People's Ex. "A" was acquired (fol. 136).

It is an admitted fact that the officers had no warrant for the arrest of Dr. Wolf and no search warrant authorizing them to search his office at the time hereinabove referred to. It is equally clear that the district attorney had strong and, we might say, conclusive evidence of the commission of a felony, i. e., procuring an unlawful abortion, by Dr. Wolf, and that the arrest was made upon such in-

formation. The two day books were taken incident to the arrest. It is also worthy of note that, so far as we can ascertain from the record, Dr. Wolf made no objection to the arrest, but, on the contrary, he apparently peaceably accompanied the officers to the office of the district attorney for questioning and investigation.

Having acquired these books, Mr. Humphries, as chief investigator, examined them and from such examination he became suspicious in several instances, particularly where the records disclosed rather large payments received by Dr. Wolf (fol. 209). In such case, representatives of the district attorney contacted the persons whose names appeared in the day book and questioned them concerning their activities (fol. 208). There is no intimation that any of the persons so contacted were forced to disclose any facts against their will. On the contrary, it appears that these patients frankly told of their relations with Dr. Wolf and whatever other doctor may have assisted in procuring an abortion in their particular case (fol. 210—see also fols. 218, et seq.).

These facts being shown out of the presence of the jury, the defendants next made an oral motion to quash the information on the ground that it was based upon evidence obtained by the district attorney in violation of the constitutional rights of the accused (fol. 243, et seq.) After considerable argument, the court finally denied this motion (fol. 267), first because the motion to quash was not made in writing, as required by the statutes (fol. 263), and, second, because counsel, having participated in the taking of the deposition of Miss Martin, were thereupon put upon notice, but nevertheless, failed to move to quash the information, and thereafter the defendants, with knowledge of these facts, entered their pleas of "not guilty" (fol. 266).

From the transcripts filed here, the court will note that the motion of petitioner, in the Wolf-Montgomery case, to return the defendant's books and records, asserts only that the alleged unlawful search and seizure constituted a violation of certain sections of the Constitution of Colorado, and no reference was made to an alleged violation of peti-

tioner's rights under the Constitution of the United States (Wolf-Montgomery Transcript, No. 593, p. 8).

In the Wolf-Fulton case, petitioner alleged, in his motion to suppress and return evidence, violation of certain portions of the Constitution of Colorado, and Amendments Four and Five of the Constitution of the United States (Wolf-Fulton Transcript, No. 594, p. 6), these two amendments having no application to state court proceedings, and in neither of said motions did he refer to the Fourteenth Amendment, or claim a violation of his rights thereunder.

We believe that we have sufficiently reviewed the facts pertinent to the issue presently before the court.

ARGUMENT.

Counsel for the petitioner state that "the sole question presented is whether the Fourth and Fourteenth Amendments of the Constitution of the United States protect a person from an unreasonable search and seizure by state officials" (p. 7, Brief of Petitioner). This, of course, assumes that the respondents concede that an unreasonable search and seizure occurred in the case at bar, a fact we most emphatically deny, and an issue not decided by the Supreme Court of Colorado.

The People of the State of Colorado are as greatly concerned with the preservation of freedom and liberty as are the people of any other state of this great union. The courts of Colorado jealously guard the rights and privileges of those persons accused of crime and brought to trial before the bar of justice. The Constitution of Colorado provides, in part.

> "The People shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures * * *." Sec. 7, Art. II, Constitution of Colorado.

It is a conceded fact that no warrant for the arrest of Dr. Wolf had been issued when the officers took him in custody on April 27, 1944.

It is likewise an undisputed fact that, at such time, the arresting officer, Louis Malach, a deputy sheriff, knew all of the facts related by Gertrude Martin from which it conclusively appeared that Drs. Wolf and Montgomery had cooperated to procure an abortion upon her. These facts, we submit, were ample to justify a reasonable belief that Wolf and Montgomery were guilty of the commission of a felony.

It therefore follows, as a matter of law, that, having reasonable grounds to believe that Dr. Wolf had committed a felony, the arresting officer had power, and was fully justified in making the arrest without warrant. In support of this position, we refer to but a few of the adjudicated cases, decided within the past two or three years. We quote from a case which we think the court will find most informative on the issue now under discussion and also on other points pertinent to this case.

> "Initially, there can be no doubt that defendant was lawfully arrested, *even though the agents possessed no warrant. The law is clear that any person, law enforcement officer or private citizen, can make an arrest where a felony has in fact been committed, and the person making the arrest has probable cause for so believing.*" (Italics supplied.)
>
> United States v. Lindenfeld, 142 Fed. (2d) 829, 831.

Continuing, the court said:

> "Conceding the lawfulness of the arrest, therefore, the crucial issue arises as to whether the agents could legally have sought and seized the cards as an incident thereto. The mass of seemingly conflicting decisions on the point, which can serve only as a general guide, since each case must be decided on its own facts, Go-Bart Importing Co. v. United States, supra, 282 U. S. at page 357, 51 S. Ct. at page 158, 75 L. Ed. 374, and through which, as we said in Matthews v. Correa, 2 Cir., 135 F. 2nd 534, 536, we must proceed 'gingerly' and 'with due circumspection, so far as lies in our power, for the constitutional rights of the petitioner and the need that government officials be not unduly hampered in tracking down crime,' have

evolved certain general principles. Surely when there is a lawful arrest, the premises may be searched; the cases are not in accord merely as to how broad an area the search can cover and as to what can be the objects of the search. The better view as to area is that the search can cover that part of the premises over which the offender's control and unlawful activities likely extended, Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915 C, 1177; Bouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Sayers v. United States, 9 Cir., 2 F. 2d 146, 147; United States v. Wilson, C. C. S. D. N. Y., 163 F. 338; or, as it was phrased in Marron v. United States, 275 U. S. 192, 199, 48 S. Ct. 74, 72 L. Ed. 231, the 'search can include "all parts of the premises used for the unlawful purpose.' A refinement of this doctrine is that the objects sought must be in the 'immediate possession and control' of the accused. Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231; Go-Bart Importing Co. v. United States, supra; United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A. L. R. 775. Within this area, there is agreement that fair game for the searchers consists of 'things used to carry on the criminal enterprise,' Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231, or the fruits of the crime and the means by which it was committed." (Id., page 832).

In the case just cited, the items "seized" by the arresting officers were simple office cards upon which the defendant, a physician, kept his records. They were, as the court pointed out, "one of the cornerstones of the government's case", and from them "the government was able to secure several additional witnesses, beyond the informers, to testify against defendant." The court approved the seizure of the records as "an incident to a lawful arrest" and held there was no error in permitting the reception of the evidence so obtained. We respectfully submit that this case correctly states the rules of law applicable to the case at bar.